

***National Labor Relations Board***  
**OFFICE OF THE GENERAL COUNSEL**  
**Advice Memorandum**

**DATE:** October 6, 1998

**TO:** William C. Schaub, Jr., Regional Director, Region 7

**FROM:** Barry J. Kearney, Associate General Counsel, Division of Advice

**SUBJECT:** Unknown Electrical Contractors, Cases 7-CA-41021, 7-CA-41188 and 7-CA-41217

596-6080-5000, 850-2001, 850-2083-2800

These Section 8(a)(3) cases were submitted pursuant to OM 98-65 for advice as to what action to take where the charges name "unknown" Employers who advertised for employees through "blind" newspaper advertisements<sup>(1)</sup> and who did not respond to employment applications from clearly-identified Union supporters, mailed to those "blind" boxes at the newspaper. The newspaper has refused to comply with an investigative subpoena seeking the identity of a boxholder, relying on the Sixth Circuit's refusal to enforce a similar subpoena in *NLRB v. Midland Daily News*.<sup>(2)</sup>

**FACTS**

In the "Kalamazoo Gazette" (Gazette), a daily newspaper of general circulation, classified advertisements were published on April 12, July 12 and July 24, 1998, seeking, respectively, "Journeyman Electrician," "Electrician - Licensed journeyman," and "Electrician - Experienced or Journeyman." Each advertisement directed a "reply" or "send resume" to boxes at the Gazette's street address, without identifying the party placing the ad. The Union, Local 131 IBEW, mailed cover letters directed to the respective "boxes" on April 17, July 15 and July 27, enclosing, respectively, 17, 10 and 10 resumes from individuals whom the cover letters identified as Union members. The Union received no responses from the box holders.

The Union filed the instant charges on, respectively, May 27, July 20 and July 29. After the Union indicated to the Region that it had no way of determining the identity of the advertising employer, the Region, on June 2, issued an investigative subpoena in Case 7-CA-41021 to the Gazette ordering it to produce documents indicating the name and address of the employer purchasing the April 12 ad. The subpoena was held in abeyance pending the decision of the Sixth Circuit in *NLRB v. Midland Daily News* and, after that decision issued, the Gazette informed the Region that it would not comply with the subpoena. Although no subpoenas were issued to the Gazette in Cases 7-CA-41188 and 7-CA-41217, the Gazette indicated that it would rely on *Midland Daily News* and would refuse to comply with any such subpoena.

**ACTION**

We agree with the Region that the instant charges should be dismissed, absent withdrawal, since these matters arise in the Sixth Circuit and are not sufficiently distinguishable from the facts in *Midland Daily News* to warrant an attempt at subpoena enforcement proceedings to identify the employer(s).

Thus, in *Midland Daily News* the Sixth Circuit affirmed a district court's denial of enforcement of a Board subpoena against *Midland*, seeking documents identifying the employer which placed a "blind" ad seeking electricians. The court found that the advertisement was a form of lawful commercial speech protected by the First Amendment, and that the Board had failed to persuade the court that exercise of its subpoena power "is the least extensive means by which the Board could reasonably expect to proceed, without unnecessarily burdening *Midland's* constitutional right to free expression", 158 LRRM at 2921. The court further stated that the Board exceeded its constitutional subpoena power "after being presented with [union] speculations of discrimination voiced only three days after the complainants had filed their applications, absent any factual support for its action, and before it had developed or implemented a less intrusive means to conduct its investigation", 158 LRRM at 2922.

We agree with the Region that, on the facts and circumstances of these cases, neither the Union nor the Board would be able to meet the burden within the Sixth Circuit set forth in *Midland Daily News* for enforcing an investigative subpoena. Thus, all three of these cases are factually similar to *Midland Daily News*. Two of the charges were filed within days of the sending of resumes to the "blind" box at the newspaper. As to the third charge, we would not find the fact that in Case 7-CA-41021 the Union waited some 42 days after mailing the resumes before filing its charge adequate, by itself, to distinguish *Midland Daily News*.

The Board could not, on these bare facts, convincingly argue that the unknown employers must have been discriminating against Union applicants. In this regard, there is no indication that the Union attempted to show discrimination or to ascertain the employers' identities by, for example, submitting a resume which did not clearly identify the applicant as a Union member to see if such an application garnered a response.

Where the employers are unknown, and where an investigative subpoena would not be enforced to enable the investigation to proceed, we conclude that the instant charges should be dismissed, absent withdrawal.

B.J.K.

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<sup>1</sup> The advertisements do not list the Employer seeking job applications and do not provide a postal address; instead, they direct that applications be sent to a "box" at the newspaper's address.

<sup>2</sup> \_\_\_ F.3d \_\_\_, 158 LRRM 2919 (6th Cir. July 16, 1998).